No. 87-416

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE AND NATIONAL CONFERENCE OF CATHOLIC BISHOPS, PETITIONERS

v.

ABORTION RIGHTS MOBILIZATION, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the order holding petitioners in contempt for failure to comply with a discovery order should be set aside on the ground that the plaintiffs lack standing to bring the underlying lawsuit.

PARTIES TO THE PROCEEDING

In addition to Abortion Rights Mobilization, Inc., Lawrence Lader, Margaret O. Strahl, M.D., Helen W. Edey, M.D., Ruth P. Smith, National Women's Health Network, Inc., Long Island National Organization for Women-Nassau, Inc., Rabbi Israel Margolies, Reverend Bea Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, Women's Center for Reproductive Health, Jennie Rose Lifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski, Judith A. Seibel, Karen DeCrow, and Susan Sherer are also plaintiffs in the district court and respondents here. James A. Baker, III, Secretary of the Treasury, and Lawrence B. Gibbs, Commissioner of Internal Revenue, are defendants in the district court and respondents here.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 824 F.2d 156. The opinion of the district court holding petitioners in contempt (Pet. App. 44a-51a) is reported at 110 F.R.D. 337. The opinions of the district court denying the motions to dismiss (Pet. App. 54a-92a, 93a-102a) are reported at 544 F. Supp. 471, and 603 F. Supp. 970, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1987. A petition for rehearing was denied on July 30, 1987 (Pet. App. 103a-104a). The petition for a writ of certiorari was filed on September 11, 1987, and was granted on December 7, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2, of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT

1. The non-federal respondents are various individuals and tax-exempt organizations that support the availability of legal abortion. They brought this suit in the United States District Court for the Southern District of New York, seeking to compel the Secretary of the Treasury and the Commissioner of Internal Revenue to revoke the tax exemption of the Roman Catholic Church.[1] The amended complaint (J.A. 5-19) described the action as one for equitable relief "to enforce the doctrine of the separation of church and state" (J.A. 5). It alleged that

[1] The suit also named as defendants the petitioners, the United States Catholic Conference (USCC) and the National Conference of Catholic Bishops (NCCB), which are the two principal national organizations of the Roman Catholic Church in the United States. Petitioners hold an "umbrella" exemption under Section 501(c)(3) of the Internal Revenue Code, covering tens of thousands of individual entities (including dioceses, parishes, schools, and hospitals), which are part of, or affiliated with, the Roman Catholic Church in the United States (Pet. App. 58a-59a). The district court ruled, however, that the complaint failed to state a claim against petitioners because they were entitled to rely upon tax exemptions granted by the government. Accordingly, petitioners were dismissed as defendants (Pet. App. 84a, 91a).

the individual plaintiffs are taxpayers and registered voters and that five of them are clergy of the Jewish or Protestant faiths whose religious beliefs "hold it permissible for women to choose to have abortions" (J.A. 7, 9).

The amended complaint alleged that the Roman Catholic Church, using tax-deductible contributions, has "participated in political campaigns in all parts of the country," assertedly "supporting 'pro-life' and opposing 'pro-choice' candidates for public office" (J.A. 11). According to the complaint, the church has regularly contributed money to "right to life groups," and its clergy have urged their congregants to do the same (J.A. 12-13). The amended complaint alleged that this activity exceeds the limitations placed on organizations classified as tax-exempt under Section 501(c)(3) of the Internal Revenue Code,[2] but that the Secretary and Commissioner have "consistently overlooked these violations and failed and refused to perform their statutory duty to enforce the Code and the Constitution" (J.A. 10).[3] The complaint further alleged that the statutory prohibition on political activity by tax-exempt religious organizations is required by the First Amendment in order to prohibit the "establishment of religion by the federal government" (*ibid.*).

[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code, as amended (the Code or I.R.C.).

[3] Section 501(c)(3) of the Code provides an exemption from federal income tax for an entity "organized and operated exclusively for religious, charitable, * * * or educational purposes, * * * no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h) [which details the permissible limits of expenditures to influence legislation]), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." Section 501(c)(3) organizations are exempted from income tax, and contributions made to them are generally deductible for federal income tax purposes under Section 170 of the Code, and are also deductible for federal estate and gift tax purposes under Sections 2055 and 2522 of the Code, respectively.

The amended complaint asserted that the challenged conduct of the Church and of the federal defendants "harmed the plaintiffs in numerous ways" (J.A. 14). The clergy plaintiffs claimed that the tax exemption accorded to the Church, whose views on abortion they described as "diametrically opposed" to their own, "is in effect a subsidy of the Church's efforts to further its religious aims in the political sphere" (J.A. 16). According to their affidavits, the government's recognition of the Church's exemption "offends," "demeans," and "denigrates" them and their status in the community, leading them to "feel that [they] are second class citizens" whose religious tenets are less "worthy of attention" than those of the Church (J.A. 44, 45, 49, 52, 54-55). All of the plaintiffs alleged that they are "at a significant disadvantage in the public debate on abortion," assertedly because the Church has "attracted and used tax-exempt, tax-deductible dollars to elect candidates sympathetic to its position, whereas the plaintiffs cannot and have not done so" (J.A. 15). The plaintiffs claimed injury to themselves "[a]s voters" on the theory that the alleged inequality of tax treatment creates a "distortion of the political process" and "impairs and diminishes" their "right to vote" (J.A. 17).

The plaintiffs sought a declaration that both the political activities of the Roman Catholic Church and the alleged "inaction" by the Secretary and the Commissioner violate the Constitution and the Internal Revenue Code. The plaintiffs also sought an injunction directing the Secretary and the Commissioner to revoke the tax exemption of the Church, to assess and collect all taxes thereby made due, and to notify donors that contributions to the Church are no longer tax-deductible (Pet. App. 4a-5a, 60a-61a; J.A. 18-19).

2. The district court denied a motion to dismiss the suit for lack of standing (Pet. App. 54a-92a), and it subsequently denied a renewed motion to dismiss on that ground in light of this Court's intervening decision in *Allen* v. *Wright*, 468 U.S. 737 (1984) (Pet. App. 93a-

102a). The court held that certain of the plaintiffs have standing to proceed against the federal respondents under one or both of two theories.

First, the court held that both the individual plaintiffs who are members of the clergy and the church-affiliated Women's Center for Reproductive Health have "Establishment Clause standing" (Pet. App. 62a-69a). The court stated that the clergy members "must counsel those in their care in accordance with religious laws that command consideration of abortion as the morally required response to pregnancy" (*id.* at 68a (footnote omitted)), and that the Women's Center "provides guidance to women in decisionmaking on issues pertaining to family life, including childbearing" (*ibid.*). The court characterized the Church's tax exemption as "[t]acit government endorsement" of the Church's position on abortion, and concluded that it caused a "discrete spiritual injury" to some of the plaintiffs because "official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message" (*id.* at 67a-68a). In the court's view, this alleged injury would be redressable by "[a] decree ordering the termination of this illegal practice and restoring all sects to equal footing" (*id.* at 69a).

Second, the district court held that all of the individual plaintiffs and three of the advocacy organization plaintiffs, as representatives of their members, have "voter standing," within the meaning of *Baker* v. *Carr*, 369 U.S. 186 (1962), to challenge "alleged government action which has improperly biased the political process against the discrete group to which they belong" (Pet. App. 72a). In the district court's view, the failure to revoke the Church's tax exemption has "distorted" the electoral process by allowing tax deductions for donations to the Church but not for donations to politically-active abortion rights groups (*id.* at 73a). The court suggested that "[a]n injunction against that discriminatory policy

will restore the proper balance between adversaries in the abortion debate" (*ibid.*).

On both occasions that it denied motions to dismiss, the district court declined to certify the standing question for interlocutory appeal under 28 U.S.C. 1292(b) (see Pet. App. 5a-6a; 552 F. Supp. 364 (1982)). Subsequently, the court of appeals denied the government's petition for a writ of mandamus or prohibition directing the district court to dismiss the complaint for lack of standing. On October 6, 1986, this Court denied the government's petitions for a writ of certiorari to review the court of appeals' order, and, alternatively, for a writ of mandamus directing the district court to dismiss the action (Nos. 86-157 and 86-162).

3. The plaintiffs are currently seeking, through subpoenas and other process, detailed discovery of information concerning the Church's tax status and its alleged lobbying and electioneering activities. To that end, they have requested documents from petitioners and from the Internal Revenue Service. See J.A. 67-79; C.A. App. 160-195, 315-332.[4] The documents requested from petitioners are voluminous and include the following: records relating to the formulation and interpretation of the bishops' position on abortion; records relating to church officials' contacts with presidential candidates and other candidates for public office; information regarding financial relationships between Catholic institutions and right-to-life organizations; and returns, records, and correspondence submitted by petitioners to the Internal Revenue Service (J.A. 69-73). The plaintiffs have also indicated their intent to depose cardinals and other high-ranking church officials who they believe may be involved in these activities (C.A. App. 200-201).

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[4] The federal respondents have maintained that disclosure of much of the information requested from the government is precluded by Section 6103 of the Code, which prohibits government disclosure of tax returns and confidential return information, except as specifically provided by statute. See C.A. App. 182-195.

The district court narrowed the discovery requests in limited respects, but otherwise ordered petitioners to comply with them (see Pet. App. 48a-49a). Petitioners subsequently advised the court that they "cannot, in conscience, comply with the subpoenas" (*id.* at 44a). On May 8, 1986, the court granted the plaintiffs' motion to hold petitioners in civil contempt for noncompliance with the court's discovery order, and it imposed on each of the petitioners a fine of $50,000 per day, to begin on May 12, 1986, and to continue "for each day that the USCC/NCCB continues to defy the court's order" (*id.* at 50a-51a). That order was stayed pending appeal, and the stay remains in effect pending this Court's disposition of the case (*id.* at 7a, 105a-110a; Fed. R. App. P. 41(b)).

4. Petitioners appealed the contempt order, arguing that it should be set aside because the district court lacks jurisdiction over the underlying action due to the plaintiffs' lack of standing. A divided panel of the court of appeals affirmed (Pet. App. 1a-43a). The majority held that petitioners, as non-party witnesses, "may challenge their contempt adjudication only on the limited ground that the District Court lacks even colorable jurisdiction over the underlying lawsuit" (*id.* at 18a), but may not seek to have the contempt order expunged by bringing "a full-scale challenge to the correctness of the district court's exercise of such jurisdiction" (*id.* at 10a). Applying that limited standard of review, the majority concluded that the trial court's assumption of jurisdiction rests on a sufficient basis to support the contempt judgment. The majority stated that the plaintiffs' suit "is more than a citizen effort to have the tax laws enforced and more than a taxpayer effort to complain of tax exemptions of others that might violate the Establishment Clause" (*id.* at 19a). Rather, the majority concluded, the plaintiffs have asserted "at least a colorable basis" (*id.* at 20a) on which to predicate standing by "claim[ing] direct, personal injury arising from the fact that the federal defendants' failure to enforce the political

action limitations of section 501(c)(3) has placed the plaintiffs at a competitive disadvantage with the Catholic Church in the arena of public advocacy on important public issues" (*id.* at 19a).

Judge Cardamone dissented, stating that the court should have decided whether the district court's assumption of jurisdiction over the suit was correct, not merely whether it was "colorable" (Pet. App. 21a-41a). The dissent stated that, if the petitioners were correct that there was no standing, then the majority's ruling had the effect of forcing them to comply with an order of the district court that "exceeded the jurisdictional limits of Article III" (*id.* at 29a). Moreover, the dissent continued (*id.* at 33a), "[t]o emasculate the witnesses' right to appeal by so narrow a view of what an appellate court may review, effectively deprives these contemnors of any meaningful appeal."

SUMMARY OF ARGUMENT

A. It is well established that a witness who is held in civil contempt for failure to comply with an order is entitled to have the contempt judgment set aside on appeal if the lower court lacked jurisdiction to enter the order that led to the contempt. If the plaintiffs here lack standing to bring this suit challenging the tax exemption of a third party, then the district court lacks subject matter jurisdiction over the suit, and it follows that enforcement of a discovery order in furtherance of the suit exceeded the court's jurisdiction. In conformity with the general rule that an appellate court is always obliged to consider the existence of subject matter jurisdiction in the lower court, the court of appeals should have resolved on petitioners' appeal whether the plaintiffs had standing.

The court of appeals erred in holding that its review of the jurisdictional issue must be limited to considering whether the plaintiffs lacked a "colorable basis" for standing. That holding forces petitioners to comply with an extremely burdensome discovery order, even if they can establish that the district court exceeded its Article

III jurisdiction in enforcing the order. As a practical matter, therefore, the court's holding renders petitioners' right to appeal meaningless.

The court of appeals' decision cannot be squared with this Court's decision in *United States* v. *United Mine Workers*, 330 U.S. 258, 289-295 (1947). It is true that a court ultimately held not to have jurisdiction may still have acted properly in exercising judicial power to the extent necessary to determine its jurisdiction, but that principle has no application here because it does not authorize a court to enforce a discovery order directed at the merits of a lawsuit over which the court has no subject matter jurisdiction. Moreover, while the rule is different for criminal contempt, a civil contempt sanction such as the one at issue here, whose purpose is to coerce compliance with the court's order for the benefit of particular litigants, must fall when it is determined that the court's order exceeded its jurisdiction. See *id.* at 294-295. Therefore, the court of appeals was obliged to consider whether the district court's ruling on standing was correct, not merely whether that ruling had a "colorable basis," and to set aside the contempt judgment if it concluded that the plaintiffs lacked standing.

B. The plaintiffs' contention that they have standing to bring this lawsuit against the federal defendants—on the ground that they have suffered a concrete injury directly traceable to the government's failure to revoke the tax exemption of the Catholic Church—is foreclosed by recent decisions of this Court. The claim that the plaintiffs who are clergy members have "Establishment Clause standing" because they are "denigrated" by allegedly favorable treatment of another religious group does not allege a judicially cognizable injury. The plaintiffs' ability to teach and minister to their congregations is not affected by the Church's tax exemption; thus, the only injury they allege is that the perception of favorable treatment of the Church "demeans" them and makes them feel like "second class citizens" (see, *e.g.*, J.A. 46, 49). This sort of "denigration" claim can be made by virtually any litigant who alleges that he is discomfited

by some government action that does not directly affect him. This Court has consistently rejected such a basis for standing, whether couched as "stigmatic" injury (*Allen* v. *Wright*, 468 U.S. 737, 753-756 (1984)), or "psychological" distress (*Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982)).

The plaintiffs' claim of "voter standing" does not allege an injury that is properly traceable to the challenged government action and thus does not confer standing to sue the federal defendants. The allegation that the plaintiffs suffer a "competitive disadvantage" (see J.A. 15) in the political arena as a result of the Church's exemption does not, standing alone, allege a concrete injury; indeed, any participant in the political process could make a similar complaint about the tax treatment of any other participant. A concrete injury in the political arena requires some direct effect on electoral results or legislative decisions in which the plaintiffs have an interest. It is entirely speculative whether the relief requested here would redress any palpable injury suffered by the plaintiffs and, indeed, whether the plaintiffs have suffered any such injury at the hands of the federal defendants. It is unknown whether a change in the Church's tax status would result in any changes in its resources or activities. And, even if it did, it is uncertain whether those changes would have any effect on the success of the candidates and causes that the plaintiffs support, which ultimately turns on the decisions of numerous individual voters. In short, the injury alleged by the plaintiffs cannot be remedied by the federal defendants; the improvement of their political position depends largely on the "independent action of * * * third part[ies] not before the court" (*Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42 (1976)). The causal connection between the Church's tax exemption and any judicially cognizable injury to the plaintiffs is too tenuous to support standing. See also *Allen* v. *Wright*, 468 U.S. at 758-759.

The plaintiffs' claimed status as "voters" does not alter this result. Their standing contention cannot be ana-

logized to *Baker* v. *Carr*, 369 U.S. 186 (1962), because they do not challenge any aspect of the electoral process. Rather, the gravamen of their claim is one of "competitor standing," in which the political arena happens to be the area in which they "compete" with the Catholic Church. Viewed in this light, it is again apparent that the plaintiffs lack standing because they can point to no "injury in fact" sustained as a consequence of the conduct of the federal defendants. The only injury alleged is that the Church's tax exemption gives it a financial advantage that automatically handicaps or injures its competitors, such as the plaintiffs. This theoretical injury cannot possibly satisfy the "concrete injury" limitation of Article III; if it did, any businessman could sue to challenge any government action that redounded to the financial benefit of his competitor.

The district court's decision upholding standing clashes with the basic separation of powers principles that underlie Article III. The plaintiffs seek to interfere with the Executive Branch's enforcement responsibilities by having the court compel the government to undertake a nationwide review of the activities of a particular tax-exempt organization. But it is not the province of the courts to "monitor the wisdom and soundness of Executive action" such as enforcement decisions (*Laird* v. *Tatum*, 408 U.S. 1, 15 (1972)). This principle has special force where, as here, the claim intrudes into the detailed structure that Congress has erected to govern tax enforcement. Indeed, any judgment the plaintiffs could secure in this suit against federal tax officials would not bind the petitioners, who are not parties to the underlying suit. It would merely serve as a catalyst for further litigation to determine petitioners' tax status. For similar reasons, prudential considerations strongly militate against upholding the standing of these plaintiffs. They are seeking to vindicate not their own legal rights, but rather that of the government to collect taxes, and their concern about tax law enforcement is "more appropriately addressed in the representative branches" (*Allen* v. *Wright*, 468 U.S. at 751).

ARGUMENT

THE DISTRICT COURT'S ORDER HOLDING PETITIONERS IN CONTEMPT SHOULD BE SET ASIDE FOR LACK OF JURISDICTION BECAUSE THE PLAINTIFFS DO NOT HAVE STANDING TO BRING THE UNDERLYING LAWSUIT

The court of appeals erred in two respects in upholding the contempt order entered against petitioners in this case. First, the court was mistaken in holding that a witness held in civil contempt for failure to comply with a discovery order can appeal that order on jurisdictional grounds only to the limited extent of asking an appellate court to find that the court issuing the order lacks even "colorable" jurisdiction over the underlying lawsuit. The consequence of this holding is that a witness has no realistic option but to comply with a discovery order of a court that lacks jurisdiction to issue that order; the witness's right to appeal from the contempt order is illusory because the court of appeals will not intervene on the witness's behalf even if it believes that the district court lacks Article III jurisdiction as a matter of law.

Second, the plaintiffs here manifestly lack standing to bring this action, and thus, even under the unduly narrow standard of review adopted by the court of appeals, the court erred in finding that the district court had a "colorable" basis for jurisdiction. The plaintiffs seek to force the government to revoke the tax exemption of an unrelated taxpayer on the ground that that taxpayer has not complied with the statutory conditions for retaining that exemption. Whether grounded in the concern of clergymen about First Amendment issues or in the assertion of other plaintiffs that their favored political candidates are disadvantaged, the plaintiffs' objections boil down to a complaint that the government is not properly enforcing the law. Such an attempt to enlist the Judicial Branch to interfere with the government's determinations respecting third persons, however, is not cognizable by the federal courts because the plaintiffs are not seeking to redress the type of concrete injury that creates a

"case or controversy" under Article III. The plaintiffs lack standing here as a matter of law, and it is a misuse of the judicial process to have this case continue through burdensome discovery and a trial when it is apparent that this lawsuit lacks the basic constitutional prerequisites to invocation of federal court jurisdiction.

A. The Contempt Order Entered Against The Petitioners Should Be Set Aside If The Plaintiffs Lack Standing To Bring The Underlying Lawsuit Against The Federal Respondents

1. Petitioners were held in contempt by the district court for failing to comply with a discovery order issued in a lawsuit to which they are not parties—namely, a suit brought by the plaintiffs against the federal respondents to force them to revoke petitioners' tax exemption. As the court of appeals acknowledged (Pet. App. 8a), there is no doubt that petitioners are entitled to take an immediate appeal from that contempt order, even though no final judgment has been entered in the underlying lawsuit. Once sanctions are imposed upon a witness for failure to comply with a subpoena or other discovery order, "the matter becomes personal to the witness and a judgment as to him" (*Alexander* v. *United States*, 201 U.S. 117, 122 (1906)), and denial of the right to appeal at that time "would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail" (*Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940)). Accordingly, he may obtain appellate review of the contempt judgment "before undertaking any burden of compliance with the subpoena" (*United States* v. *Ryan*, 402 U.S. 530, 533 (1971)).

It is well established that an appellate court is obliged to consider, as a threshold question, the existence of subject matter jurisdiction, both of the appellate court itself and of the lower court. *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 541 (1986). When a lower court lacks subject matter jurisdiction, the appellate court is bound to notice that defect even if it is not raised by

the parties; in that event, it has "'jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit'" (*ibid.*, quoting *United States* v. *Corrick*, 298 U.S. 435, 440 (1936)). And such subject matter jurisdiction, of course, is lacking if the "case or controversy" requirement of Article III, including the requirement that the plaintiffs have standing, is not satisfied. *Bender* v. *Williamsport Area School District*, 475 U.S. at 541-542.

It also has long been recognized that a contempt judgment may be attacked on appeal on the ground that the court that entered it lacked subject matter jurisdiction over the underlying action and hence lacked authority to enter the order that gave rise to the contempt. Thus, in *Ex parte Fisk*, 113 U.S. 713 (1885), this Court overturned on that basis a contempt judgment that had been entered against the defendant for failing to submit to a pretrial examination. The Court stated (*id.* at 718):

> When * * * a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void.

Similarly, in *In re Sawyer*, 124 U.S. 200 (1888), the Court explained in overturning a contempt judgment that "[t]he Circuit Court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void" (*id.* at 221). See also *In re Green*, 369 U.S. 689 (1962); *United States* v. *United Mine Workers*, 330 U.S. 258, 289-295 (1947); *Ex parte Rowland*, 104 U.S. 604, 612 (1881).

Relying upon these principles, petitioners took an appeal from the district court's order holding them in contempt and argued that the order should be set aside for lack of subject matter jurisdiction because the plaintiffs lacked Article III standing to sue the federal defendants. If a district court is disabled from reaching the merits of

a controversy for lack of subject matter jurisdiction, it follows that it may not enforce discovery orders issued in connection with the merits of that suit. In the words of this Court, "[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States" (*Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.* (*Valley Forge*), 454 U.S. 464, 475-476 (1982)). This constitutional prohibition bars such litigants from invoking the process of the federal courts to obtain papers or testimony from their opponents or other persons. See also *United States* v. *Morton Salt Co.*, 338 U.S. 632, 641-642 (1950). Thus, if the plaintiffs here lacked standing to bring the underlying lawsuit, the district court lacked jurisdiction to enforce a discovery order at their behest, and the judgment holding petitioners in contempt for failing to comply with that order should be set aside on appeal.

2. While the court of appeals expressed agreement with many of the principles discussed above, it declined to decide whether the plaintiffs had standing, and therefore it refused to set aside the contempt judgment. The court of appeals agreed that petitioners could appeal the contempt order (Pet. App. 8a) and that an appellate court is obliged to consider the question of the lower court's jurisdiction (*id.* at 16a), and it did not dispute that a witness should not be held in contempt for failing to comply with a discovery order that exceeds the court's jurisdiction. Indeed, the court acknowledged that it would have agreed with petitioners that they could challenge the plaintiffs' standing on a contempt appeal, except that it disagreed with one basic premise of petitioners' challenge—namely, that the district court was precluded from ordering and enforcing discovery if it lacked subject matter jurisdiction over the underlying lawsuit (*id.* at 12a). To the contrary, the court stated, the district court could still exercise judicial power, including the power to compel discovery, even if it lacked subject matter jurisdiction (*id.* at 12a-13a). The court concluded that the contempt order could be set aside only

if the district court lacked even a "colorable basis" for exercising subject matter jurisdiction (*id.* at 18a-20a).

The result reached by the court of appeals is anomalous. The court recognized that the question of the plaintiffs' standing is a "substantial" one (Pet. App. 19a), and that question undoubtedly is a legal one that the court of appeals could have resolved. But the court nevertheless determined that it must close its eyes to that legal question, with the consequence that the petitioners are left with no alternative but to comply with burdensome discovery in a lawsuit in which it is likely that the court lacks subject matter jurisdiction. Moreover, as the dissent pointed out (Pet. App. 38a-39a), the "colorable basis" standard established by the majority to govern review on appeal does not appear to provide any greater discipline to prevent a district court from exceeding its jurisdiction than does the narrow standard for the availability of mandamus. Accordingly, at least in this context, the well-established right to appeal from a contempt judgment would be rendered meaningless as a practical matter (see *id.* at 32a-34a).

In our view, the court erred in fashioning this severe limitation on the right to appeal a contempt judgment that exceeds the district court's jurisdiction. A correct interpretation of the decisions of this Court relied upon by the court of appeals demonstrates that there is no obstacle to consideration of the lower court's subject matter jurisdiction on an appeal from a judgment of civil contempt entered to enforce compliance with a discovery order.

3. The court of appeals appears to have derived its "colorable basis" standard from this Court's decision in *United States* v. *United Mine Workers*, *supra*. In that case, the United States, which had taken over operation of most of the country's coal mines, sought declaratory and injunctive relief in federal district court against a strike threatened by the union. The union claimed that the Norris-LaGuardia Act, 29 U.S.C. 101, deprived the court of jurisdiction to enjoin a strike. The district court

issued a temporary restraining order against a strike, while it considered the Norris-LaGuardia issue. The union and its president disobeyed the temporary restraining order, and they were held in criminal and civil contempt and fined. On appeal, the contemnors argued that, because of the Norris-LaGuardia Act, the district court lacked subject matter jurisdiction to enter the temporary restraining order that led to the contempt.

This Court upheld the contempt judgments, finding that the Norris-LaGuardia Act was not applicable (see 330 U.S. at 269-289). Of particular relevance here, however, is this Court's discussion of the "alternative grounds which support the power of the District Court to punish violations of its orders as criminal contempt" (*id.* at 289)—what the court of appeals below termed a court's "jurisdiction to determine its jurisdiction" (Pet. App. 13a). This Court explained that, even if it had ultimately concluded that the Norris-LaGuardia Act divested the district court of jurisdiction, "the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief" (330 U.S. at 293).[5] Accordingly, unless "the question of jurisdiction [were] frivolous and not

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[5] This principle is well established, and we do not dispute that a court may issue and enforce orders aimed at determining whether the court has subject matter jurisdiction. See also *United States* v. *Shipp*, 203 U.S. 563, 573 (1906)). Thus, we do not take issue with Judge Kearse's observation in her concurring opinion (Pet. App. 42a-43a) that a trial court may have the power to permit some discovery in order to allow the court to determine whether standing exists. But Judge Kearse's observation has no relevance to the instant case. The discovery order that forms the predicate for the contempt judgment was indisputably directed at the merits of the litigation. For purposes of the standing inquiry, the district court correctly accepted the allegations in the plaintiffs' complaint as true, and no one suggested that discovery was needed to illuminate the standing inquiry. Indeed, the district court had already unequivocally held, on two separate occasions, that the plaintiffs have standing to bring the underlying lawsuit. Thus, the order underlying the contempt judgment plainly cannot be justified as "discovery relating to standing" (*id.* at 43a).

substantial" (*ibid.*), the issuance of the temporary restraining order would still have been a lawful exercise of the court's power, and the judgment of criminal contempt would not have been set aside.

In the course of this discussion, however, the Court was careful to distinguish between civil and criminal contempt (330 U.S. at 294-295 (footnote omitted)):

> It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued, * * * and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court.

The Court therefore concluded that, "[i]f the Norris-LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety" (*id.* at 295).

Thus, far from supporting the court of appeals' holding here, this Court's opinion in *United Mine Workers* directly contradicts it. In concluding the contrary—that *United Mine Workers* indicates that it could not inquire into the jurisdiction of the lower court other than to determine whether there existed a "colorable basis" for jurisdiction—the court of appeals reasoned that *United Mine Workers* showed that "[a] lack of subject matter jurisdiction does not disable a district court from exercising all judicial power" because it may inquire into its own jurisdiction (Pet. App. 12a). The court further reasoned that this power would extend to "[c]ompelling a recalcitrant witness to furnish unprivileged evidence," and that, in order to preserve "the orderly processes of the courts," such an order must be obeyed upon pain of criminal contempt, even if it is subsequently determined by an appellate court that the trial court lacks jurisdiction (*id.* at 13a). The court then concluded that there is

no basis for distinguishing between civil and criminal contempt for these purposes and therefore that a civil contempt sanction should also be upheld, irrespective of whether it is ultimately determined that the trial court lacked jurisdiction over the lawsuit (*id.* at 13a-15a).

As the dissent cogently explains (Pet. App. 36a-38a), the majority's analysis is flawed in two major respects. First, the *United Mine Workers* principle that a court must be able to exercise some power in order to determine its jurisdiction—and that the use of that power is enforceable by criminal contempt—does not mean that there are no limits on what a court without jurisdiction can do. In particular, a court is not empowered to issue discovery orders going to the merits of a case over which it lacks jurisdiction.

Second, the majority erred in failing to recognize that civil contempt cannot be equated with criminal contempt for these purposes. Criminal contempt sanctions are imposed "to vindicate the authority of the court" (*Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)). When someone flouts that authority—for example, by "disrupt[ing] the courtroom" (Pet. App. 13a)—his conduct is punishable as an act of criminal contempt, and there is no reason why he should go unpunished simply because it turns out that the court lacked subject matter jurisdiction over the case in which the disruption occurred. By contrast, civil contempt "is remedial, and for the benefit of the complainant" (*Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. at 441). The "ultimate object" of civil contempt is "the enforcement of the rights and remedies of a litigant" (11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2960, at 584 (1973)).[6] Therefore, when it is determined that there is

[6] This crucial distinction is reflected in this case where the objective of the civil contempt judgment against petitioners, which imposed sanctions only until they complied with the discovery order (see Pet. App. 50a-51a), clearly was to coerce compliance with that order for the benefit of the plaintiffs, not to vindicate the authority of the court. Thus, this case does not present issues comparable to those currently pending before the Court in *United States* v.

no jurisdiction over the underlying lawsuit, the basis for the civil contempt judgment disappears, and there is no reason to enforce it.

That is precisely the conclusion this Court reached in *United Mine Workers*, where it stated that "[t]he right to remedial relief [in the form of civil contempt sanctions] falls with an injunction which events prove * * * was beyond the jurisdiction of the court" (330 U.S. at 295). The Court's ultimate conclusion that, if the district court had lacked jurisdiction to enter the restraining order, "the conviction for civil contempt [for failing to comply with that order] would be reversed in its entirety" (*ibid.*) is fully applicable here.[7] That conclusion requires that the contempt judgment against petitioners be set aside if the district court did not have jurisdiction to enforce the discovery order because of the plaintiffs' lack of standing, and therefore the court of appeals erred in sustaining the contempt judgment on a mere showing of a "colorable basis" for standing.[8]

Providence Journal Co., No. 87-65 (argued Jan. 20, 1988), where the respondent was held in criminal contempt for publishing a newspaper article in defiance of a temporary restraining order that respondent had not endeavored to challenge through the judicial process.

[7] If the court of appeals' analysis of the scope of review of civil contempt judgments on appeal were correct, this Court in *United Mine Workers*, in order to sustain even the civil contempt judgment in that case, would have needed to decide no more than that the district court had a "colorable basis" for issuing the restraining order. The extensive consideration that the Court gave to the question whether the district court actually had jurisdiction (see 330 U.S. at 269-289; *id.* at 312-328 (Frankfurter, J., concurring); *id.* at 343-351 (Rutledge, J., dissenting)) graphically demonstrates that the decision below cannot be squared with *United Mine Workers*.

[8] Indeed, the fact that the petitioners claim that the district court's exercise of jurisdiction here is barred, not merely by statute as in *United Mine Workers*, but by Article III, and thus exceeds the constitutional power of the federal courts, makes the court of appeals' failure to resolve that jurisdictional question even more inappropriate.

4. The court of appeals also relied heavily on this Court's decision in *Blair* v. *United States*, 250 U.S. 273 (1919), to justify its refusal to determine whether the district court had jurisdiction. In *Blair*, several witnesses were held in civil contempt for refusing to testify before a grand jury that was investigating violations of the federal election laws. Stating that a witness "is not interested to challenge the jurisdiction of court or grand jury over the subject-matter that is under inquiry," the Court held that the witnesses could not challenge the contempt judgment on the ground that the election laws were unconstitutional and hence the grand jury lacked "jurisdiction" to conduct its investigation (see *id.* at 279). The court of appeals below held that *Blair* was not restricted to the grand jury context, but rather "was intended to state a rule of wider application"—namely, that any witness, even in a civil case, who has been held in contempt can challenge only "whether there exists a colorable basis for exercising subject matter jurisdiction," but may not mount "a full-scale challenge to the correctness of the district court's exercise of such jurisdiction" (Pet. App. 10a).

There are, however, two fundamental distinctions between the issue in *Blair* and the question presented here. First, as the dissent explains (Pet. App. 34a-36a), the rationale of *Blair* was addressed to the grand jury context in which it arose, and that decision does not control here where the witness challenges the Article III jurisdiction of the court over the lawsuit that underlies the contempt sanction. The power of the district court to enforce the discovery order issued in this case was derivative from its jurisdiction over the underlying lawsuit, and therefore depended upon satisfaction of the requirements of Article III. But a grand jury "does not depend on a case or controversy for power to get evidence." *United States* v. *Powell*, 379 U.S. 48, 57 (1964). See also *United States* v. *Bisceglia*, 420 U.S. 141, 148 (1975). Rather, the grand jury is an investigative body whose inquiries may be wide-ranging. Thus, as the dissent ex-

plained, "the jurisdiction of the grand jury is not dependent upon the constitutionality of the statutes which prohibit the conduct being investigated" (Pet. App. 34a). Hence, "a declaration that the statute in *Blair* was unconstitutional would not [have given] the witness the relief he sought," and therefore he was "not interested" to challenge the validity of that statute on his contempt appeal (Pet. App. 34a).

Indeed, the opinion in *Blair* reflects this Court's reliance on the special nature of the grand jury. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 349-350 (1974). The Court in *Blair* noted that a grand jury investigation is not "preceded by a formal charge" (250 U.S. at 282). The scope of its inquiries is not "limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime" (*ibid.*). In contrast to a lawsuit, where the nature of the dispute is framed at the outset by the complaint, "the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning" (*ibid.*). Therefore, a challenge to the subject matter of the grand jury's investigation cannot reasonably be made before the investigation is concluded; the grand jury at least has "jurisdiction to investigate the facts in order to determine the question whether the facts show a case within [its] jurisdiction" (*id.* at 283). By contrast, the district court's jurisdiction over the lawsuit here can be assessed at the outset of the litigation simply by examining the complaint.

Moreover, *Blair* is not controlling here for another, independent reason. In seeking to challenge the substantive power of Congress to enact the statute that was the subject of the grand jury investigation in *Blair*, the witnesses were asserting a contention about what in a later prosecution would become part of the merits of the case, rather than a challenge to the power of the federal courts under Article III to decide the merits (including the

question of the statute's constitutionality). Hence, we submit that even a witness called to testify at a trial could not justify refusal to do so on the grounds asserted by the grand jury witnesses in *Blair*.

In short, neither *Blair* nor any other decision of this Court supports the court of appeals' holding here. On the contrary, under this Court's jurisprudence, the district court's lack of Article III jurisdiction over the underlying lawsuit means that the court did not have the power to compel petitioners to comply with the plaintiffs' discovery request, and that the petitioners should not be compelled to submit to the district court's discovery orders without an opportunity on appeal to challenge the court's jurisdiction. Thus, the court of appeals erred in limiting its inquiry to whether the district court's jurisdiction was "colorable;" it should have determined whether the district court in fact has jurisdiction over the underlying lawsuit.

B. The Plaintiffs Lack Standing To Challenge Petitioners' Tax Exemption

The district court's holding that the plaintiffs have standing to sue to revoke the tax exemption of the Roman Catholic Church cannot be reconciled with established principles governing standing. The theories of "Establishment Clause standing" or "voter standing" recognized by the district court plainly do not allege a sufficiently concrete and redressable personal injury to satisfy the strictures of Article III. On the contrary, these allegations of injury do not materially distinguish the plaintiffs from any citizen who seeks to "have the Government act in accordance with law" (*Allen* v. *Wright*, 468 U.S. 737, 754 (1984)). That type of challenge is not cognizable in federal court. Indeed, the district court's holding that the plaintiffs have standing so clearly contravenes principles well established by this Court that it cannot reasonably be maintained that the complaint in this case establishes even a "colorable" basis for standing. Accordingly, even under the unduly narrow standard of

review adopted by the court of appeals, that court erred in failing to set aside for lack of jurisdiction the order holding petitioners in contempt.

1. *A Plaintiff Lacks Standing To Maintain A Suit Challenging Governmental Action Directed At An Unrelated Party Unless He Alleges That He Has Personally Suffered A Concrete Injury That Is Fairly Traceable To The Government's Challenged Conduct And That Is Redressable By The Requested Relief*

The basic principles that govern the question whether a plaintiff has standing to maintain a lawsuit in federal court are well established. A plaintiff must " 'allege[] such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf" (*Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975) (emphasis in original), quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). The "core component" of standing, derived directly from the "cases" or "controversies" requirement of Article III of the Constitution, requires the plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief" (*Allen* v. *Wright*, 468 U.S. at 751). That injury cannot be an "abstract" one (*O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974)); it must be " 'distinct and palpable' " (*Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979) (citation omitted)). The Court has explained that these requirements arise out of a "single basic idea—the idea of separation of powers" (*Allen* v. *Wright*, 468 U.S. at 752)—in that they demarcate fundamental limits on the role of the federal courts in our tripartite system of government.

In addition to these constitutional requirements, this Court has also recognized that the standing doctrine embraces certain prudential limitations on the exercise of federal jurisdiction, including "the rule barring adjudication of generalized grievances more appropriately addressed in

the representative branches" (*Allen* v. *Wright*, 468 U.S. at 751). The Court has summarized this aspect of the standing inquiry as "[e]ssentially, * * * whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief" (*Warth* v. *Seldin*, 422 U.S. at 500 (footnote omitted)). In short, a federal court " 'is not the proper forum to press' general complaints about the way in which government goes about its business" (*Allen* v. *Wright*, 468 U.S. at 760, quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 112 (1983)).

On several occasions in recent years, the Court has reaffirmed these basic standing principles and emphasized that their effect is generally to deny access to the federal courts by plaintiffs who seek to litigate the claim that the government is failing to enforce its laws—in particular, laws relating to tax exemptions—against a third party. Most recently, in *Allen* v. *Wright*, *supra*, the Court held that the parents of black public school children lacked standing to challenge the tax-exempt status of allegedly discriminatory private schools. The Court explained that the plaintiffs' complaint that the government was not adequately enforcing the tax exemption laws could not alone give rise to standing: " '[a]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning' " (468 U.S. at 754 (quoting *Valley Forge*, 454 U.S. at 483)).

The Court further held that the plaintiffs' claim that blacks suffered "a stigmatic injury, or denigration" (468 U.S. at 754), as a result of discriminatory government conduct (namely, recognition of tax exemptions for segregated schools) alleged no concrete personal injury that could give rise to standing. The claim of denigration was too abstract to be judicially cognizable; rather, such an injury could confer standing only if the stigma were allegedly suffered "as a direct result of having personally

been denied equal treatment" (*id.* at 755). Otherwise, the Court explained, "standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption" (*id.* at 755-756). The Court also rejected the plaintiffs' attempt to base standing on the assertion that granting the tax exemptions to the private schools "diminished [their children's] ability to receive an education in a racially integrated school" (*id.* at 756). The Court held that the line of causation between the government's enforcement of the tax laws and public school desegregation was too weak; it was mere speculation whether the withdrawal of tax exemptions would affect the racial balance in the public schools attended by the plaintiffs' children (*id.* at 758).

In *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), this Court also found no standing to litigate whether the government was properly enforcing the tax laws against other persons. A group of indigent plaintiffs had sued Treasury officials to challenge a Revenue Ruling that allowed nonprofit hospitals to qualify for tax exemption under Section 501(c)(3) even if they provided indigents with no more than emergency room services. This Court held that the plaintiffs' allegations of injury in the form of the denial of services by these hospitals did not confer standing because it was "purely speculative" whether the alleged injury could fairly be traced to the government's tax enforcement action "or instead result[s] from decisions made by the hospitals without regard to the tax implications" (426 U.S. at 42-43). And in *Valley Forge*, the Court held that the plaintiffs lacked standing to challenge the conveyance of surplus federal property to a sectarian institution because they "fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees" (454 U.S. at

485 (emphasis in original)). The allegations of personal injury in the instant case are not materially different from the allegations in these decisions of this Court, and it follows that here also the plaintiffs lack standing to challenge the tax exemption of an unrelated party.

2. *The Plaintiffs' Allegation That They Are Denigrated By The Conferral Of A Tax Exemption Upon The Catholic Church Does Not Assert An Injury That Is Cognizable In Federal Court*

The district court has held that the plaintiff members of the clergy, who hold and teach religiously-inspired pro-abortion views, have "Establishment Clause standing" because they are "denigrated" by the grant of a tax exemption to the Catholic Church, which the court viewed as "government endorsement of a theology contrary to [the plaintiffs'] guiding principles" (see Pet. App. 68a).[9] The court found that this alleged denigration causes a "discrete spiritual injury" to these plaintiffs because it "diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message" (*ibid.*). The court added that "[t]he granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others" (*id.* at 69a).

This asserted "denigration" injury is indistinguishable from the "stigmatic" injury alleged in *Allen* and held by

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[9] This injury is not actually alleged in the complaint, but was derived by the district court from affidavits filed by various of the clergy plaintiffs. They averred that the exemption "offends," "demeans," and "denigrates" them and their religious values (J.A. 44, 45, 46, 52, 54), making them feel like "second class citizens" (J.A. 49) whose beliefs are less "worthy of attention" (J.A. 44) than those of the Catholic Church. The court also found that the Women's Center for Reproductive Health had "Establishment Clause standing" because it provides counseling on abortion and family planning and is affiliated with the Presbyterian Church (Pet. App. 68a-69a; see J.A. 53-55).

this Court not to constitute a judicially cognizable injury.[10] In *Allen*, the plaintiffs claimed that granting tax exemptions to schools " 'that treat members of their race as persons of lesser worth' " (468 U.S. at 749 (citation omitted)), denigrated the members of the race that had been discriminated against (*id.* at 752); here, the district court held that granting a tax exemption to one religious entity "tarnishes all other[] [religions]" (Pet. App. 69a). In neither case, however, is there alleged any injury that is "suffered as a direct result of having personally been denied equal treatment" by the federal defendants (468 U.S. at 755). The plaintiffs' ability to minister to their congregations or to teach them that their religion "command[s] consideration of abortion as the morally required response to pregnancy" (Pet. App. 68a (footnote omitted)) is not affected by the grant of a tax exemption to the Catholic Church and would not be enhanced by the relief the plaintiffs seek.[11]

The district court's statement that the stigma allegedly incurred by the clergy plaintiffs "diminishes their position in the community, [and] encumbers their calling in life" (Pet. App. 68a) does not describe a judicially cognizable injury. The black plaintiffs in *Allen* made essentially the same claim—loss of status in the community and on the job are a large part of what it means to be "denigrated." If this type of allegation were sufficient to

[10] Indeed, the result here follows *a fortiori* from that case. At least the private schools in *Allen* (although not the defendant federal officials) allegedly discriminated against black children. By contrast, petitioners—the third parties here—are not alleged to have performed acts directed against the plaintiffs, but at most to have expressed personal views and engaged in political advocacy on subjects also of interest to the plaintiffs.

[11] The plaintiffs do not assert that they or their organizations have been denied a tax exemption. Moreover, their affidavits indicate their belief that their religious institutions would not be entitled to a tax exemption if they were to engage in the type of political activity that the complaint attributes to the Catholic Church. See, *e.g.*, J.A. 43, 45, 52, 54.

confer standing, virtually any litigant could challenge any government action that he views as unduly favorable to someone else simply by alleging what cannot be disproved—namely, that he suffers denigration, stigma, or like form of discomfiture as a result of the challenged action. Standing would then require little, if anything, more than the mere motivation to bring suit.

Moreover, while the clergy plaintiffs, because of their profession, may be particularly sensitive to a perceived unequal treatment of religion, that fact does not separate them from their co-religionists for standing purposes; "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy" (*Valley Forge*, 454 U.S. at 486). See also *Diamond* v. *Charles*, No. 84-1379 (Apr. 30, 1986), slip op. 11 (physician cannot establish standing to challenge government failure to enforce laws against other physicians by "cloak[ing his claim] in the nomenclature of a special professional interest"). Indeed, the present case, no less than *Allen*, illustrates why recognition of "denigration" as a judicially cognizable injury would profoundly subvert the limitations of Article III. In *Allen*, the Court hypothesized that the plaintiffs' theory could enable a "black person in Hawaii [to] challenge the grant of a tax exemption to a racially discriminatory school in Maine" (468 U.S. at 756). Here, that hypothetical comes to life; clergy from Florida (J.A. 53) and New York (*e.g.*, J.A. 43, 45) are urging the court to scrutinize the conduct of Catholic priests in Texas and South Dakota (J.A. 12). In short, while the clergy plaintiffs and other non-Catholics may well feel denigrated by what they perceive as unduly favorable government treatment of another religious group, that feeling is not the sort of concrete and palpable injury that is an Article III prerequisite to invocation of the jurisdiction of the federal courts.[12]

[12] There is no warrant for departing from these basic standing principles simply because the alleged injury is a "spiritual" one based on a claim of an Establishment Clause violation. In *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), an Establishment

Indeed, the denigration claim is closely analogous to the standing claim rejected by this Court in *Valley Forge*. There, plaintiffs with strongly held views about separation of church and state challenged a government transfer of property to a religious institution, relying upon a "'shared individuated right to a government that "shall make no law respecting the establishment of religion"'" (454 U.S. at 482 (citations omitted)). This Court held that the plaintiffs lacked standing, however, because they failed to identify "any personal injury suffered by them *as a consequence* of the alleged constitutional error"; their "psychological" distress at government action, even if "phrased in constitutional terms," established no basis for standing (*id.* at 485-486 (emphasis in original)). The plaintiffs here similarly base their "Establishment Clause standing" claim essentially on "psychological" distress caused by government action that they view as favoring another religious entity; this type of generalized, abstract injury is not judicially cognizable.

Clause challenge to Bible reading in the public schools, this Court observed that "[i]t goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain" (*id.* at 224 n.9). The Court concluded that there was standing because the plaintiffs—students in the schools—were "directly affected by the laws and practices against which their complaints [were] directed" (*ibid.*). The Court specifically contrasted the standing of the plaintiffs there with *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), where the Court had concluded that the plaintiffs lacked standing to raise the same substantive issue. As this Court recently observed, "[t]he plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause—for as *Doremus* demonstrated, that is insufficient—but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them" (*Valley Forge*, 454 U.S. at 487 n.22). The clergy plaintiffs here are hardly in a position to allege a comparable element of personal injury.

3. *The Plaintiffs' Allegation That The Catholic Church's Tax Exemption Gives Opponents Of Abortion An Unfair Advantage Over Them In The Political Process Does Not Provide A Basis For Standing Because It States No Injury Fairly Traceable To The Federal Defendants Or Redressable By The Requested Relief*

a. The district court also held that the plaintiffs had established what it called "voter standing" based on their alleged status as "voters" participating "in the public debate on abortion" (J.A. 15, 17). The complaint alleged that the Catholic Church had "attracted and used tax-exempt, tax-deductible dollars to elect candidates sympathetic to its position, whereas the plaintiffs cannot and have not done so," thereby enabling the Church to obtain a "financial and political advantages" (J.A. 15). The complaint concluded that the tax exemption injured the plaintiffs because "[i]n the inherently competitive political arena an advantage granted to one competitor automatically constitutes a handicap to the others" (*ibid.*). Relying on *Baker* v. *Carr*, 369 U.S. 186 (1962), the district court held that these allegations established "voter standing" to challenge "alleged government action which has improperly biased the political process against the discrete group to which they belong" (Pet. App. 72a). The court of appeals in turn relied entirely on this theory to support its finding that the plaintiffs had made a "colorable" claim of standing, stating that the plaintiffs "have claimed direct, personal injury arising from the fact that the federal defendants' failure to enforce the political action limitations of section 501(c)(3) has placed the plaintiffs at a competitive disadvantage with the Catholic Church in the arena of public advocacy on important public issues" (Pet. App. 19a).

This "competitive disadvantage" allegation simply does not establish a basis for standing to invoke the jurisdiction of an Article III court. Standing cannot be conferred merely on the basis of the statement that the plaintiffs are necessarily disadvantaged in the political arena as a logical corollary to the fact that the Church's

tax exemption allegedly gives it an advantage. That statement, standing alone, does not allege a concrete injury; it merely states that the plaintiffs "suffer[] in some indefinite way in common" (*Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923)) with every voter or participant in the political arena that does not share the Church's views. Indeed, an essentially similar complaint could be made by any participant in the political process about any aspect of the tax or regulatory treatment of any other participant in that process. Such a complaint of resulting "imbalance in the electoral and legislative process" (Pet. App. 74a) no more represents a personal, judicially cognizable, injury to the plaintiffs than does their "denigration" claim.

Nor have plaintiffs alleged that this asserted "competitive disadvantage" has some concrete effect that causes personal injury to themselves. In this voter context, the essence of a claim of concrete injury must be that the electoral fortunes of causes or candidates that the plaintiffs support are being harmed by the existence of the Church's tax exemption and, concomitantly, that that harm would be remedied by the relief requested here. But, as even the district court acknowledged (see Pet. App. 73a-74a), the Church's tax exemption does not have that kind of direct effect on electoral results or legislative decisions; rather, the exemption's effect on such concrete matters is at most "diffuse, minute, and indeterminable" (*Daughtrey* v. *Carter*, 584 F.2d 1050, 1056 (D.C. Cir. 1978)). Accordingly, the plaintiffs here have alleged no concrete injury to themselves as "voters" that can be traced to the government action they seek to challenge, and hence they fail to meet the fundamental standing requirements this Court has recognized.

b. This Court has repeatedly emphasized that an alleged injury can confer Article III standing only if it "fairly can be traced to the challenged action of the defendant, and [is] not injury that results from the independent action of some third party not before the court" (*Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 41-42). See also *Warth* v. *Seldin*, 422 U.S. at 505. The *Eastern Kentucky* case, like this one, involved a suit challenging the Commissioner's grant of a tax exemption to third parties—hospitals that had denied medical care to the indigent plaintiffs. The plaintiffs challenged the hospitals' tax exemption on the ground that a hospital that does not treat indigent patients in the plaintiffs' position is not a "charitable" institution that should be tax-exempt under Section 501(c)(3).

This Court held that the injury suffered by the plaintiffs did not give them standing to challenge the hospitals' tax exemption. The Court explained that the only defendants were the federal officials involved, and the only action challenged in the suit was the grant of the tax exemption. But it was "speculative" whether the hospitals' failure to treat the plaintiffs was attributable to the Commissioner's actions, rather than to "decisions made by the hospitals without regard to the tax implications" (426 U.S. at 42-43). And it was "equally speculative whether the desired exercise of the Court's remedial powers in this suit would result in the availability to [the plaintiffs] of such [medical] services" (*id.* at 43). Rather, it was "just as plausible that the hospitals * * * would elect to forgo favorable tax treatment" (*ibid.*). The Court concluded, therefore, that the suit should be dismissed for lack of standing because the plaintiffs had failed " 'to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm' " (*id.* at 44-45 (quoting *Warth* v. *Seldin*, 422 U.S. at 505)).

In *Allen* v. *Wright*, *supra*, the Court similarly held that the plaintiffs lacked standing because the alleged injury—inadequate desegregation of the public schools—was not properly traceable to the tax exemptions that they were challenging. The plaintiffs contended that the withdrawal of tax exemptions from segregated private schools would yield changes that would reduce their enrollment, with some students transferring to, and thus

further desegregating, the public schools. The Court held, however, that this connection was too tenuous to permit the public school parents to challenge the tax exemptions of the private schools. The Court explained that it was "entirely speculative" whether "withdrawal of a tax exemption from any particular school would lead the school to change its policies" and "just as speculative" whether "any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status" (468 U.S. at 758). Therefore, the "chain of causation" that formed the basis for the claim of standing "involve[d] numerous third parties * * * whose independent decisions may not collectively have a significant effect on the ability of public school students to receive a desegregated education" (*id.* at 759).

As in *Allen* and *Eastern Kentucky*, the causal connection here between the third party's tax exemption and any concrete injury suffered by the plaintiffs is too speculative to confer standing to sue the federal defendants. It is pure conjecture whether a change in the status of the Catholic Church's tax exemption would enhance the plaintiffs' position in the abortion controversy. First, it is unknown whether withdrawal of the Church's tax exemption would lead to any change in the Church's resources and activities. Obviously, many people contribute to the Church for reasons that have little or nothing to do with the tax consequences; a change in the Church's tax-exempt status would not necessarily affect their level of contributions to any significant degree. And, even if there were some overall reduction in contribution levels, one cannot predict how that would affect the Church's alleged political activity. Moreover, a change in the Church's policies, standing alone, would not alleviate the injury allegedly suffered by petitioners. The candidates and causes that the plaintiffs support in the abortion controversy can be advanced in the political arena only through the decisions of numerous voters. It is entirely

speculative whether a hypothetical change in the Church's political activity would influence the decisions of enough voters to have an impact on any given election.

Indeed, the plaintiffs and the district court do not appear to dispute that the relief the plaintiffs seek here will not necessarily advance their position in the abortion controversy. The plaintiffs state (Br. in Opp. 54) that it is "irrelevant" whether "the Church will continue to be active politically" if its exemption is revoked; the district court agreed that "[t]he standing question is unaffected by the church defendants' possible resolve to continue their current rate of political activity" despite an adverse decision with respect to their tax exemption (Pet. App. 73a-74a). But these observations clearly betray a misconception of the controlling legal principles. It is fundamental that Article III requires that the plaintiff be personally injured by the action he is challenging and that the injury will be redressed by the relief he seeks. See *Allen* v. *Wright*, 468 U.S. at 751, 753 n.19. Thus, Article III does not permit the plaintiffs to allege an injury consisting of a disfavored position in the abortion debate or other political controversy as the basis for a challenge to the validity of the Church's tax exemption, since that unfavorable position cannot properly be said to result from the granting of the tax exemption or to be likely to be altered by its withdrawal. In essence, the plaintiffs' complaint presents only another species of a suit brought by a person understandably distressed, but not directly affected, by what he views as the government's failure to enforce the law against a third party. See *Valley Forge*, 454 U.S. at 485.[13]

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[13] The plaintiffs have no adequate response to this difficulty. They state that "the injury * * * is not the Catholic Church's political activities *per se*, but the government's subsidy of those activities" (Br. in Opp. 56); the district court states that "[r]edress will come directly from the government's consistent enforcement of the tax laws, not from any change in the political activities of the Church" (Pet. App. 97a) But these statements mark a return to the contention, akin to the plaintiffs' "denigration" claim, that the mere fact that the Church allegedly receives favorable treatment is enough to

In sum, the injury of which the plaintiffs complain in this case—an alleged disadvantage in the political arena for the position they espouse in the abortion controversy—is not one that can be remedied by the Commissioner of Internal Revenue or the Secretary of the Treasury, who are the defendants in this action. Rather, any improvement in the plaintiffs' position in the abortion controversy depends largely on the "independent action of * * * third part[ies] not before the court" (*Eastern Kentucky*, 426 U.S. at 42). Therefore, as in *Eastern Kentucky* and *Allen*, the plaintiffs have suffered no concrete injury traceable to the conduct of the federal defendants, or redressable by the requested relief, that can justify this lawsuit against them.

Moreover, quite apart from the fact that the relief requested by the plaintiffs will not redress the personal injury of which they complain, as a practical matter the plaintiffs cannot possibly obtain in this lawsuit the relief that they request. The plaintiffs seek a declaration that the government has violated the law in failing to revoke the Church's tax exemption and an order directing the government to revoke the Church's tax exemption and to assess and collect back taxes due as a result of the revocation (J.A. 18-19). But the Church was long ago dismissed as a party from this suit. If the district court were to enter an order directing the federal defendants to withdraw the Church's tax exemption and to assess back taxes, the Church would remain free to challenge the revocation in a declaratory judgment action

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support standing. That simply cannot be correct; if the mere fact of favored treatment of one party is enough to constitute a concrete injury to another, then any interested party can challenge a perceived violation of the law by the government. But "[t]he federal courts were simply not constituted as ombudsmen of the general welfare" (*Valley Forge*, 454 U.S. at 487), and therefore the plaintiffs may not bring suit merely to ensure "consistent enforcement of the tax laws" (Pet. App. 97a). Rather, the plaintiffs here can demonstrate standing only if the alleged failure in government enforcement causes a concrete injury to them. They essentially acknowledge, however, that they cannot allege such a concrete injury.

under Section 7428 of the Code, or to challenge in normal fashion any deficiency asserted, either by filing a petition in the Tax Court or by filing a refund suit in the district court. Because the Church is not a party to the underlying litigation here, the district court's decision would have no res judicata or collateral estoppel effect in later litigation. Thus, far from ending the matter, a ruling here in the plaintiffs' favor would not resolve the validity of the Church's tax exemption; it would only act as a catalyst to further litigation in another forum. Thus, this lawsuit well illustrates the concern repeatedly expressed by this Court over cases raising "questions of broad social import where no individual rights would be vindicated" (*Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 100).

c. The fact that the injury claimed by the plaintiffs assertedly arises out of their status as "voters" provides no basis for departing from the basic standing principles we have discussed. In particular, the district court's reliance on *Baker* v. *Carr*, *supra*, is in error. *Baker* was a suit brought against state officials to challenge the malapportionment of the voting district in which the plaintiffs resided and were registered to vote. The plaintiffs lived in a "disfavored" county, one with a "gross disproportion of representation to voting population" (369 U.S. at 207). The Court found that the plaintiffs suffered concrete injury to their voting power on that account—an injury that the Court analogized to "dilution" of the vote by "a false tally" or by "stuffing of the ballot box" (*id.* at 208). *Baker* thus involved a "concrete injury to fundamental voting rights" (*Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1974)) and does not represent a departure from the general standing principles more recently reaffirmed in *Eastern Kentucky* and *Allen*.

The claim of the plaintiffs here is quite different. They clearly do not claim a dilution in voting power; as the district court acknowledged (Pet. App. 73a), they "do not complain of diminished representation and do not demand increases in actual representation." They do not

claim that any candidate has been deprived of an opportunity to run for office or to appear on a ballot, nor do they claim that any voter has been hampered in an effort to vote for the candidate of his choice. In short, the plaintiffs do not challenge any aspect of the electoral process. What they do claim is that the tax exemption conferred upon the Catholic Church gives the Church a financial advantage over the plaintiffs in an area in which they allegedly compete, namely, the political arena. This is not truly a challenge based on the plaintiffs' status as "voters," and it surely bears no resemblance to the claim upon which standing rested in *Baker*.

In *Winpisinger* v. *Watson*, 628 F.2d 133 (1980), the District of Columbia Circuit rejected a "voter standing" contention somewhat akin to that of the plaintiffs here, and that court's analysis is instructive. The plaintiffs in *Winpisinger* were supporters of Senator Kennedy in his contest with President Carter for the Democratic presidential nomination. They alleged that President Carter's campaign workers were illegally using federal funds for campaign purposes, thereby giving the President an unfair advantage over Senator Kennedy in the campaign. Even though the injury complained of by the plaintiffs was focused on a single electoral contest between two candidates, and hence was considerably more immediate and focused than the general disadvantage claimed here, the court of appeals correctly held that the plaintiffs in *Winpisinger* lacked standing because the alleged injury was not directly traceable to the challenged conduct. The court explained that "[t]he endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event"; in order to connect the alleged injury with the challenged actions of the Carter supporters, the court would have had "to accept a number of very speculative inferences and assumptions" (628 F.2d at 139). In sum, the District of Columbia Circuit correctly held that a plaintiff

does not have standing to challenge a perceived advantage granted to someone else merely because the two parties are adversaries in the political arena (where the alleged advantage does not directly affect participation in that arena).[14] The plaintiffs in this case have made no allegation of a more concrete injury that would justify departing from this rule here.[15]

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[14] In reaching a contrary conclusion here, the district court relied heavily (see Pet. App. 71a-73a) on *Shakman* v. *Democratic Organization*, 435 F.2d 267 (7th Cir. 1970), cert. denied, 402 U.S. 909 (1971) (*Shakman I*), where a group of voters was held to have standing to sue the county challenging alleged abuses of the patronage system. That case, however, is of little precedential value. The correctness of *Shakman* in light of the intervening standing decisions of this Court has been questioned by other courts. See, *e.g.*, *Winpisinger* v. *Watson*, 628 F.2d at 141 & n.32. Indeed, the Seventh Circuit itself recently revisited *Shakman* in a subsequent appeal in the same case, and it concluded that, because of the major changes in the "legal landscape" since its earlier decision, its prior finding of standing could not be regarded as binding law of the case and would have to be reconsidered (*Shakman* v. *Dunne*, 829 F.2d 1387, 1393 (1987)). Upon reexamination, the court concluded that the plaintiffs lacked standing to challenge the hiring practices of the incumbent county administration, and hence that the complaint had to be dismissed to that extent (the original complaint had challenged a broader spectrum of patronage practices). Significantly, the Seventh Circuit relied heavily on *Winpisinger* in concluding that the alleged connection between the challenged patronage hiring practices and the injury—a disadvantage to electoral opponents of the incumbent because persons would be induced to work for the incumbent in expectation of receiving a patronage job—was too speculative to support standing (see 829 F.2d at 1397-1398). In any event, even if *Shakman I* were regarded as still authoritative, it involved a challenge to patronage practices in "a single County, not a coordinate branch of the federal government" (*Winpisinger* v. *Watson*, 628 F.2d at 141 n.32), and its holding therefore has little bearing in the present context of a nationwide suit against an arm of the federal government.

[15] Indeed, the causal link in the instant case is considerably more tenuous than it was in *Winpisinger* because an additional set of conjectures concerning the possibility of changes in the Church's activities must be accepted before the uncertainties of the electoral process even come into play.

d. In fact, the district court's use of the term "voter standing" to characterize the plaintiffs' claim is a misnomer. As the plaintiffs state in their complaint, the gravamen of their claim is that the Catholic Church is their "competitor" in the political arena, and therefore any advantage conferred upon the Church "automatically constitutes a handicap" to the plaintiffs (J.A. 15). The court of appeals similarly recognized that the plaintiffs' contention boiled down to a complaint that they have been placed at a "competitive disadvantage with the Catholic Church in the arena of public advocacy" (Pet. App. 19[illegible] n.3). Their claim accordingly is better characterized as one of "competitor standing"; the electoral or political arena merely happens to be a particular area in which the plaintiffs and the Catholic Church "compete."

Viewed in this light, it is once again apparent that the injury complained of by the plaintiffs cannot be sufficient to confer standing to challenge the Church's tax exemption. This Court, of course, has recognized that a competitive injury can confer standing on a plaintiff to challenge an action that most directly affects a third party. See, *e.g.*, *Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970). But an absolute prerequisite to such standing, derived from Article III, is that the plaintiff himself must suffer an "injury in fact" from the challenged action (see *id.* at 152). There was no doubt that this requirement was met in *Data Processing* and *Clarke*, where the dispute was whether a class of companies would be allowed to compete with the plaintiffs in a particular business (see *Clarke*, slip op. 5, 14; *Data Processing*, 397 U.S. at 152). Here, however, the injury alleged by the plaintiffs is not sufficient to justify a claim of "competitor standing."

The plaintiffs' argument on this point is based on a series of related assumptions. The plaintiffs allege that they are competitors of the Catholic Church in the political arena and that any "advantage granted to one competitor automatically constitutes a handicap to the others" (J.A. 15). At the same time, the plaintiffs maintain that the Church's tax-exempt status necessarily gives it a "financial advantage" (*ibid.*). And this financial advantage apparently automatically gives the Church a "political advantage" (*ibid.*). Altogether, what the plaintiffs argue is that whenever someone receives any money or avoids an expense—for example, by means of a tax benefit—that infusion of funds necessarily injures its competitors, and the competitors have standing to challenge the legality of the receipt or retention of funds.

This type of assumed injury, however, clearly is not sufficient to satisfy the standing criteria set forth by this Court. Indeed, the logical implications of the plaintiffs' theory are so far-reaching that, if adopted, it would dramatically subvert the limitations of Article III. Competing organizations, whether or not tax-exempt, presumably could sue to revoke the tax exemption of a civic league, labor union, or business league (see I.R.C. § 501 (c)(4), (5), and (6)). Outside the specific area of tax exemptions, one businessman presumably could sue the government claiming that the IRS had been too generous in allowing his competitor to take a particular deduction. Or, even outside the tax area, any government action that redounded to the financial benefit of a competitor might be challenged by a third party—for example, a competitor might claim that the government had been too lenient in imposing an administrative fine on another company for certain environmental or safety violations. All of these claims fail to satisfy Article III because the causal connection between an increase in a competitor's bank account and an injury to the plaintiff is too tenuous; the injury is not "fairly traceable" (*Allen* v. *Wright*, 468 U.S. at 751) to the challenged government conduct. The competitive injury alleged by the plaintiffs here is no different in principle from the hypothetical cases we have described; the only injury the plaintiffs allege is that the Church's tax exemption allows it to receive more money

than it would if the tax laws were properly enforced, and that those additional funds received by the plaintiffs' competitor necessarily injure them in the arena in which they compete. The decisions of this Court clearly establish that Article III requires a more direct causal relationship between a palpable injury suffered by the plaintiffs and the challenged conduct of the defendants.

The deficiencies of the plaintiffs' theory are illuminated in *American Society of Travel Agents, Inc.* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), cert. denied, 435 U.S. 947 (1978). The plaintiffs there were travel agents who brought suit against the government challenging the tax treatment of certain tax-exempt organizations who offered travel programs. The plaintiffs' contention was that the financial benefits of tax-exempt status enjoyed by these organizations gave them an "unfair competitive advantage in the sale of tour packages" (566 F.2d at 148). The plaintiffs did not, however, point to any concrete effect on their business; rather, they alleged an injury from the government's "creation of an unfair competitive atmosphere" and sought "relief in the form of the more congenial competitive environment which would supposedly result from proper tax enforcement policy" (*id.* at 149). Relying primarily on this Court's decision in *Eastern Kentucky*, the court of appeals concluded that "this sort of injury claim [is] too speculative to support standing" (*ibid.*) and does not establish "injury in fact" (*id.* at 148). The court of appeals unequivocally rejected the plaintiffs' reliance on *Data Processing*, stating that "we do not believe that *Data Processing* should be read to endorse standing for any private business, individual or corporate, which wishes to contest the tax treatment of a competitor" (566 F.2d at 151). For the same reasons, the plaintiffs' effort here to challenge their competitor's tax exemption —in which a causal connection between the tax treatment and any concrete injury suffered by the plaintiffs is considerably more attenuated and speculative than it was in *American Society of Travel Agents*—fails to satisfy the strictures of Article III.

4. *The District Court's Assumption Of Jurisdiction Over This Lawsuit Is Fundamentally At Odds With The Separation Of Powers Principles That Underlie The Doctrine Of Standing*

This Court has explained that "the pervasive and fundamental notion of separation of powers" plays a basic role in the Article III standing inquiry in that it "counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties" (*Allen* v. *Wright*, 468 U.S. at 752, 761). See also *Valley Forge*, 454 U.S. at 474-475. In *Allen*, the Court concluded that conferring standing on the plaintiffs to challenge the tax exemption of a third party could not be squared with this basic principle. That is no less true here. The plaintiffs seek to compel the Executive Branch to undertake a nationwide review of the activities of a tax-exempt organization in order to determine whether it continues to qualify for exemption. But suits challenging an Executive agency's enforcement program, even when "premised on allegations of several instances of violations of law," are "rarely if ever appropriate for federal-court adjudication" (*Allen* v. *Wright*, 468 U.S. at 759-760). In the absence of an assertion of concrete and remediable injury directly attributable to unlawful government conduct, the courts do not assume the "amorphous [task of] general supervision of the operations of government" (*United States* v. *Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)), nor act "as virtually continuing monitors of the wisdom and soundness of Executive action" (*Laird* v. *Tatum*, 408 U.S. 1, 15 (1972)). And, as the Court recently emphasized in another context, a suit to compel an agency to undertake a specific enforcement inquiry is particularly unsuitable for judicial resolution because "an agency decision not to enforce often involves a complicated balancing of a num-

ber of factors which are peculiarly within its expertise" (*Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985)).[16]

The administration of the tax laws presents a particularly strong case for refusal by the courts to hear a claim like that being pressed by the plaintiffs because such a claim intrudes into a detailed structure erected by Congress to govern tax enforcement. Congress has delegated "the administration and enforcement of" the tax laws exclusively to the Secretary and the Commissioner (I.R.C. § 7801(a)), including the power to "prescribe all needful rules and regulations for the enforcement of" those laws (I.R.C. § 7805(a)). Congress has reserved to itself the task of overseeing the enforcement of the revenue laws by creating a Joint Committee on Taxation to investigate the administration, operation, and effects of the tax system (I.R.C. §§ 8001-8023).[17] At the same time, Congress has established precisely-defined channels for the

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[16] The Court in *Chaney* identified some of those factors as follows (470 U.S. at 831-832):

> [T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

[17] Congress's oversight responsibility is not taken lightly. Indeed, last summer a congressional committee, after careful study, issued a report and recommendations on the very subject that underlies this lawsuit—namely, political activities of tax-exempt organizations. See Staff of the House Subcomm. on Oversight of the Comm. on Ways and Means, 100th Cong., 1st Sess., *WMCP: 100-12, Report and Recommendations on Lobbying and Political Activities by Tax-Exempt Organizations* (Comm. Print 1987). And last month Congress enacted legislation addressing the question of political and lobbying activities of tax-exempt organizations. See Sections 10711-10714 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 (Dec. 22, 1987).

adjudication of tax disputes initiated by private parties —proceedings in the Tax Court to redetermine deficiencies (I.R.C. §§ 6212, 6213), refund or collection actions in the district courts or the Claims Court (I.R.C. §§ 6532, 7422; 28 U.S.C. 1346, 1491), and, in specific and limited circumstances, declaratory judgment actions, *e.g.*, by an organization seeking recognition of its own tax-exempt status under Section 501(c)(3) (I.R.C. § 7428). Apart from these avenues of relief, Congress has precluded "any person, whether or not such person is the person against whom such tax was assessed," from maintaining a "suit for the purpose of restraining the assessment or collection of any tax" (I.R.C. § 7421(a)), and has barred declaratory relief in all actions "with respect to Federal taxes" (28 U.S.C. (Supp. III) 2201). This structure reflects a deliberate judgment that the vigor of the government's enforcement of the tax laws is generally not a matter for litigation instituted by private parties. In particular, Congress has indicated that invocation of judicial examination of the validity of a particular organization's tax exemption is the prerogative only of the government and the organization in question, not of third parties.

The specifics of this case graphically illustrate the mischief that would flow from conferring standing on persons such as the plaintiffs to challenge the tax exemption of a third party. At the behest of a litigant who is not directly affected, the district court is poised to conduct a nationwide review of the IRS's administration and enforcement of Section 501(c)(3), an inquiry that will intrude into the sensitive internal workings of both the government and the Roman Catholic Church. The Church includes many thousands of organizations across the country—parishes, dioceses, schools, hospitals, and others —that, for administrative purposes, fall under the "umbrella" exemption given to the petitioners. The plaintiffs would have the district court substitute its judgment for the enforcement judgment of the IRS by reviewing the internal affairs of a multitude of those entities to deter-

mine whether they engage in more political activity than their status under Section 501(c)(3) permits. Moreover, as developments in this case have already shown, this judicial inquiry would likely touch upon confidential tax return information collected by the IRS and result in constitutional controversy over efforts to obtain Church documents and to take testimony from Church officials.[18] Such a judicial undertaking cannot properly be required, or justified, on behalf of litigants whose own tax liability is unaffected by the administrative action they seek to challenge.

The district court's response to these separation of powers concerns is entirely wide of the mark. The court acknowledged that there are limitations on access to the courts "to resolve abstract policy questions of broad pub-

[18] It is highly pertinent that the executive function that the plaintiffs ask the district court to assume here involves the sensitive task of separating church activities relating to the exercise of religious beliefs—such as the announcement of positions taken on theological grounds—from impermissible lobbying and intervention in political campaigns (cf. *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1979)). As this Court observed in *Lemon* v. *Kurtzman*, 403 U.S. 602, 620 (1971), "state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." The possibilities for excessive government entanglement with religion that are inherent in the inquiry that the plaintiffs seek to compel here further counsel against interjection of the courts into the exercise of this executive function. Indeed, the difficulties attending church audits recently prompted Congress to enact detailed remedial legislation (see Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1033(a), 98 Stat. 1034; H.R. Conf. Rep. 98-861, 98th Cong., 2d Sess. 1101-1114 (1984)), which establishes stringent procedural safeguards in the conduct of examinations of churches. These restrictions, however, are directed to government investigation of religious activity, rather than to investigations conducted by private parties, and by their terms would not appear to apply to a lawsuit like this one. Thus, entertainment of such a suit by the federal courts might well have the anomalous effect of granting the plaintiffs greater license to investigate the Church's continuing qualification for tax exemption than Congress allows to the agency that it has charged with the enforcement of the tax laws.

lic importance" (Pet. App. 79a). But the court stated that "[n]ot all issues of broad public importance * * * are necessarily, or even better, left to the executive and the legislature" (*ibid.*). It found that the limitations on judicial action are not implicated here because the plaintiffs do not "call for judicial selection of an appropriate policy"; the correct policy already has been chosen by Congress and set forth in Section 501(c)(3) (Pet. App. 79a).

The district court thus fails to recognize that courts can impermissibly intrude into matters reserved to the Executive even if they do not resolve "abstract policy questions." In this case, as in *Allen*, the plaintiffs do not challenge "a fundamental IRS policy decision" (468 U.S. at 765). On the contrary, the parties agree that organizations exempt from tax under Section 501(c)(3) are restricted from engaging in political activity; the Treasury regulations are quite explicit on this point (see, *e.g.*, Treas. Regs. §§ 1.501(c)(3)-1(b)(3), 1.501(c)(3)-1(c)(3)). What the plaintiffs challenge—and seek to have the court control—are the details of the execution of that policy, which is but one of the numerous facets of the Internal Revenue Code that it is the duty of the Secretary of the Treasury to administer. The plaintiffs "seek to have the Judicial Branch compel the Executive Branch to act in conformity" with the law (*Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. at 217), according to enforcement procedures and criteria that the plaintiffs and the court devise. In short, the plaintiffs invoke the courts here not to obtain a binding resolution of a specific legal question in which they have a cognizable interest, but rather to exercise control over the Executive Branch's administration of its law enforcement responsibilities. This Court has made clear that litigants may not resort to the federal courts for that purpose.

Finally, in addition to the constitutional infirmities in the plaintiffs' standing claim, all three of the factors that the Court has identified as forming the prudential limi-

tations on standing (see *Allen* v. *Wright*, 468 U.S. at 751) militate against entertainment of this lawsuit. The plaintiffs are seeking to vindicate not their own legal rights, but rather the *government's* right to collect taxes from an organization (and from its contributors) that allegedly is not eligible for a tax exemption. The plaintiffs' concern about tax law enforcement is "more appropriately addressed in the representative branches" (*ibid.*), *i.e.*, through the congressional oversight procedures established by statute. And the plaintiffs' complaint does not "fall within the zone of interests protected" by Section 501(c)(3), which simply defines those organizations that Congress has determined should be granted a tax exemption because of their "charitable" or "religious" purposes (see 468 U.S. at 751).

In sum, it is manifest that the plaintiffs lack standing to maintain this lawsuit. As in *Allen*, "[r]ecognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders'" (468 U.S. at 756, quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)).[19]

[19] Moreover, permitting the present case to proceed to trial would encourage similar suits by third parties dissatisfied with the tax treatment of other groups with whose views they disagree. Even if such suits would ultimately fail on the merits, they could be used for purposes of securing information through discovery for utilization in public debate, as well as a means of turning the courts themselves into fora for policy debate rather than adjudicative tribunals.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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